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JUDGMENT, LEVY AND SALE WITHIN FOUR MONTHS OF BANKRUPTCY AS A VOIDABLE PREFERENCE. — Couched in a single sentence containing more than one hundred and fifty words and a formidable array of clauses, the meaning of the vital part of section 60 *b* of the Bankruptcy Act, defining voidable preferences, is, as one might expect, to some extent enveloped in obscurity. A particularly troublesome situation under this section presents itself when a creditor with reasonable cause to believe his debtor insolvent procures a judgment, levies execution and receives the proceeds of the sale, all within four months of the initiation of bankruptcy proceedings against the debtor. Under these circumstances the Supreme Court of Oregon has recently allowed a trustee in bankruptcy to recover from the creditor.[1]

This result, manifestly in perfect accord with the spirit of bankruptcy legislation, is, nevertheless, not easily reached under the wording of section 60 *b*. The material part of the section reads as follows: "If a bankrupt shall have procured or suffered[2] a judgment to be entered against him in favor of any person, or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the

[1] Anderson *v.* Stayton State Bank, 38 Am. B. Rep. 4. In Clarke *v.* Larremore, 188 U. S. 486, Justice Brewer, speaking for the court, raised the question here involved but withheld decision upon it.

[2] These words are satisfied by mere passive non-resistance on the part of the debtor, Wilson *v.* Nelson, 183 U. S. 191.

judgment, or of the recording or registering of the transfer, if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent *and*[3] *the judgment or transfer then operate as a preference*,[4] and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, *it shall be voidable by the trustee*[3] and he may recover the property or its value from such person."

Much of the ambiguity is wrapped up in the "it" italicized above — does it refer to judgment or transfer, or does it refer to preference? The respective consequences flowing from these alternative interpretations may with propriety be examined as circumstances surrounding the expression of legislative intent.

Assuming, first, that "it" refers to judgment or transfer and not to preference, what is the operation of this section? Some preliminary matters must be noticed at this point. A judgment as such does not entitle the holder to take precedence over simple contract creditors in bankruptcy. A lien, however, does confer priority, and having in mind the prevalence of state statutes making judgments liens on the debtor's real estate, at least one evil in bankruptcy emanating from a judgment is readily perceived. This situation seems to be covered by the section.[5] If, however, the words are to be given their primary import, the statute goes too far — it enables the trustee to invalidate the judgment itself. As certain claims, notably those sounding in tort, are provable only if reduced to judgment,[6] there looms the possibility of grievous hardship upon the creditor. Clearly he should not be deprived of the provability of his claim because he knew of the tortfeasor's insolvency. This difficulty was felt in connection with the use of the word "judgment" in section 67 *f*, and circumvented by construing "judgment" to mean "judgment lien,"[7] a feasible solution in this instance.

In still another way may a judgment militate against the scheme of equality among creditors, namely, by enabling the creditor to sell the debtor's property on execution and pocket the proceeds, — the situation in the principal case. A strict adherence to the language used precludes the application of section 60 *b* here. The judgment has not "operated as a preference," assuming, as we may for aught that appears in the principal case, that the debtor owned no real estate. The subsequent levy of execution might or might not have followed the judgment. That the judgment has operated to enable the holder to get a preference is the most that can be said. Further, the statute declares that the judgment shall be voidable by the trustee. But in the principal case the judgment no longer exists — it has been satisfied. Conceivably, however, the legis-

[3] The italics are the writer's.

[4] Taken literally this clause could never be satisfied, since it is impossible to have a preference until there has been bankruptcy.

[5] And yet not precisely; for if, as is usually the case, the successful litigant must docket his judgment before it becomes a lien, the judgment has not, accurately speaking, operated as a preference.

[6] See REMINGTON, BANKRUPTCY, 2 ed., §§ 635, 680.

[7] *Ibid.*, § 777.

lature may have intended to annex retrospective effect to the trustee's avoidance, thus rendering the judgment a nullity and all proceedings taken pursuant to it unauthorized, in which event the sheriff and a *bona fide* purchaser at the execution sale as well as the creditor would stand liable to the trustee for conversion of the property. This last complication is not the only obstacle in the path of this solution. The courts have repeatedly declined to concede restrospective operation to section 67 *f* under which certain liens are rendered void by the advent of bankruptcy,[8] although the construction suggested would be no more forced there than here. Furthermore, we have indicated in an earlier paragraph the necessity for and the propriety of construing "judgment" as used in section 60 *b* to mean "judgment lien." If that construction is to prevail, the creditor in the principal case is secure in his advantage, for if he ever obtained a judgment lien, in selling the debtor's property he has relied, not upon it but upon his lien of execution — the antedated avoidance of any judgment lien he may have had would, therefore, be a matter of no concern to him. In short, if "it" be taken to refer to "judgment," recovery by the trustee in the principal case seems impossible.

Choosing the second alternative, namely, that the "it" refers to "preference" and not to "judgment," the tangle largely disappears. The trustee is empowered to avoid "preferences," and the fact that there is no "judgment" in existence at the time he proposes to avoid is entirely immaterial. There is now but one conceivable objection to his recovery. As pointed out above, the requirement that the judgment operate as a preference has not been strictly fulfilled. The judgment, however, has operated to enable the creditor to get a preference, and in view of the broad construction given to various parts of the statute in the past,[9] this comparatively slight objection would not seem to be fatal.

An entirely different method of approach to the situation presented in the principal case has been employed in at least one instance.[10] The sale on execution was deemed to be a "transfer" within the meaning of section 60 *b*; warranted perhaps by the comprehensive definition of "transfer" contained in the initial paragraph of the Act. On several occasions, however, the Supreme Court of the United States has shown a marked reluctance to press the meaning of "transfer" to the detriment of a creditor who had secured a questionable advantage,[11] apparently distinguishing between voluntary and involuntary transfers by the

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[8] *In re* Bailey, 144 Fed. 214; *In re* Resnek, 167 Fed. 574.

[9] Although the statute makes all general assignments acts of bankruptcy, yet, unless the assignment is fraudulent, nothing contained in the statute allows the trustee to recover the property from the assignee. To avoid the obvious incongruity, the courts, however, have allowed the trustee to recover. *In re* Gutwillig, 92 Fed. 337. See Prof. Samuel Williston, "Transfers of After-Acquired Personalty," 19 HARV. L. REV. 557, 580. This suggests a mode of reaching the creditor in the principal case, — the acts of the creditor constitute the act of bankruptcy specified in § 3 *a* (3). Perhaps the right of the trustee to recover may be implied from this.

For further examples of liberties taken with the statute, see West Co. *v.* Lea, 174 U. S. 590, wherein § 3 *b* was whittled away.

[10] Galbraith *v.* Whitaker, 119 Minn. 447, 138 N. W. 772.

[11] See Thompson *v.* Fairbanks, 196 U. S. 516; Humphry *v.* Tatman, 198 U. S. 91, reversing 184 Mass. 361. See also York Manufacturing Co. *v.* Cassell, 201 U. S. 344.

debtor, or, as it is more usually expressed, between giving and taking a preference.[12] The disposition of the court to perpetuate this distinction probably precludes what would otherwise be the simplest and most satisfactory solution of the difficulty.[13]

CONSTRUCTIVE TRUST THEORY AS APPLIED TO PROPERTY ACQUIRED BY CRIME. — If A. has provided that B. is to have certain of his property after A.'s death and B. slays A., does B. acquire the property and if so can he keep it? This question has faced the courts with increasing frequency of recent years.[1] The abundant discussion [2] and criticism of the opposing answers given indicate that no solid ground by which a just result can be reached without judicial gymnastics has yet been generally adopted. The question appears in cases of inheritance, of intestate succession, and of gifts by will. It may also arise out of life insurance policies, as in a recent Minnesota case where the insured was murdered by his wife whom he had made beneficiary of the policy. A brother of the deceased and the murderess were the only heirs under Minnesota law. The court held that the brother could recover in an action on the policy.[3]

The killing in any case may have been intentional, in the heat of blood, negligent, or accidental. Death by accident is dismissed from consideration. That the insane heir may inherit and pass to her heirs the property of her victim was held recently by a Canadian court.[4] This result is clearly right, for no crime[5] was committed according to the view taken of insanity. It may well be argued that only a killing with the purpose of hastening the acquirement of property should deprive one of enjoying its

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[12] See Prof. Samuel Williston, "Transfers of After-Acquired Personalty," 19 HARV. L. REV. 557, 577. The source of the distinction is perhaps traceable to the Bankruptcy Act of 1867, under which clearly only preferences which the debtor took an active part in bringing about were voidable. See U. S. REV. STAT. 1875, § 5128.

[13] Most satisfactory, because on the other line of attack the section does not cover the case in which the creditor becomes aware of the debtor's insolvency after the entry of the judgment but before the execution sale. The section could be amended with profit somewhat as follows: A sale on execution shall be deemed a transfer within the meaning of this section, if, and only if, the levy of execution has taken place within four months of the filing of the petition in bankruptcy, or after the filing of the petition and before the adjudication.

[1] For the provisions of continental codes on this subject attention is called to an article by J. Chadwick in 30 L. QUART. REV. 210. On the question whether their effect is to prevent the criminal from taking, or is to allow him to take property and thereafter be deprived of it, see 8 HARV. L. REV. 170.

[2] AMES, LECTURES ON LEGAL HISTORY, 310, reprinting an article in 36 AM. L. REG. (N. S.) 225; 25 IR. LAW TIMES, 423 and 433; 29 CENT. L. J. 461; 32 *Ibid.* 333; 34 *Ibid.* 247; 39 *Ibid.* 217; 41 *Ibid.* 377; 4 HARV. L. REV. 394; 8 *Ibid.* 170; 24 *Ibid.* 227.

[3] Sharpless *v.* Grand Lodge A. O. U. W., 159 N. W. 1086 (Minn.).

[4] *Re* Estate of Maude Mason, 31 Dom. L. R. 305 (Br. Col.). Accord, *In re* Houghton, [1915] 2 Ch. 173; Holdom *v.* Grand Lodge A. O. U. W., 159 Ill. 619, 43 N. E. 772 (insane beneficiary does not forfeit policy and is not barred from his right to sue).

[5] Crime, either felony or misdemeanor, is the adopted test of the English and Canadian courts. See *In re* Houghton, *supra;* Estate of Hall, [1914] P. 1, 8; Cleaver *v.* Mutual Life Fund Association, [1892] 1 Q. B. 147, 156; Lundy *v.* Lundy, 24 Can. Sup. Ct. 650. *Cf.* also the language of Earl, J., "He can not vest himself with title by crime." Riggs *v.* Palmer, 115 N. Y. 506, 513, 22 N. E. 188, 190.